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1 [The R.M.C. 803 session was called to order at 1009,  
2 21 September 2021.]

3 MJ [COL ACOSTA]: This commission is called to order.

4 Trial Counsel, good morning. Please identify who is  
5 here on behalf of the United States and indicate whether they  
6 are located here or are appearing remotely from the National  
7 Capital Region. If any counsel are making their first  
8 appearance, please indicate such so that we can get their  
9 detailing and qualifications, status to oath, and whether they  
10 have acted in any disqualifying manner in this case on the  
11 record.

12 TC [MR. MILLER]: Good morning, Your Honor. These  
13 proceedings are being transmitted via CCTV to public viewing  
14 locations in the United States pursuant to the commission's  
15 order AE 028M dated 22 November 2019.

16 Present for the United States in the Remote Hearing  
17 Room in Northern Virginia as identified in AE 338L, detailing  
18 memorandum dated 20 September 2021, are myself, Mark Miller;  
19 Lieutenant Commander Cherie Jolly; Major Jeffrey Benedict;  
20 Lieutenant Commander Keven Schreiber; and Major Michael Ross.  
21 Also present in this Remote Hearing Room for the prosecution  
22 are Mr. Pascual Tavaréz-Patino and Staff Sergeant Carlos  
23 Salazar. Major Michael Ross, Your Honor, has not yet put his

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1 qualifications on the record and will need to do so today.

2 Lieutenant Commander Schreiber has previously put his  
3 on the record, however, it was done in a closed session and I  
4 don't know if the court would also like him to do it in an  
5 open session.

6 Present for the United States at Guantanamo Bay Naval  
7 Station, Cuba, is Mr. John Wells, Staff Sergeant Kyle Swayzee,  
8 Mr. Parker Smith, Mr. Louis Marmo, Mr. Anthony Kinney, and  
9 Mr. Samir Hayek. With your permission, Your Honor, I would  
10 now ask the new counsel, Major Ross, who has not appeared  
11 before the commission in open session, to announce his  
12 qualifications and certifications to be -- appear, excuse me,  
13 before this court.

14 I would also indicate that Major Jeffrey Benedict,  
15 while he has made an appearance in a closed session, has not  
16 made one in an open session and we -- whatever the court's  
17 preference is, if you would like him to do it in open session,  
18 he is available here to do that.

19 MJ [COL ACOSTA]: Counsel, I will ask that both announce  
20 their detailing qualifications.

21 ATC [MAJ ROSS]: Good morning. May it please the court.  
22 I am Major Michael Ross ----

23 MJ [COL ACOSTA]: Mr. Ross, can you please come to the

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1 podium, please.

2 ATC [MAJ ROSS]: Good morning, Your Honor. I am Major  
3 Michael Ross, have been detailed to this military commission  
4 by the chief prosecutor. I'm qualified under R.M.C. 502 and  
5 have previously been sworn in accordance with R.M.C. 807. I  
6 have not acted in any manner which might tend to disqualify me  
7 from this proceeding.

8 MJ [COL ACOSTA]: Thank you, Counsel.

9 Lieutenant Commander Schreiber.

10 ATC [LCDR SCHREIBER]: Good morning, Your Honor. I'm  
11 Lieutenant Commander Keven Schreiber, JAG Corps United States  
12 Navy. I've been detailed to this military commission by the  
13 chief prosecutor. I'm qualified under R.M.C. 502 and have  
14 been previously sworn in accordance with R.M.C. 807.

15 I have not acted in any manner which might tend to  
16 disqualify me from this proceeding.

17 MJ [COL ACOSTA]: Thank you, Counsel. And, Counsel, just  
18 for ease for our interpreters, I've been informed that -- and  
19 our stenographers -- that speaking through the mask is making  
20 it a little more difficult for them to hear you. I'm keeping  
21 my mask on because I am seated in very close proximity to  
22 other individuals right now and I would be -- I'm too close to  
23 them to take my mask off. But that's why I want you to go to

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1 the podium and speak at the remote location and at this  
2 location. And when you're at the podium you may take your  
3 mask off to speak, and that will help both our interpreters  
4 and our stenographers hear you.

5 Okay. Defense counsel, good morning. Please account  
6 for members of the defense team. Indicate where they are  
7 located, either appearing remotely or in the national -- or  
8 locally. And if any counsel are making their first  
9 appearance, please indicate so so that we can get their  
10 detailing qualifications, their status as to oath, and whether  
11 they've acted in any disqualifying manner in this case on the  
12 record.

13 TC [MR. MILLER]: Your Honor, before Mr. Natale begins, we  
14 still have Major Benedict.

15 MJ [COL ACOSTA]: Oh, pardon me.

16 ATC [MAJ BENEDICT]: Good morning, Your Honor.

17 MJ [COL ACOSTA]: Good morning, Counsel.

18 ATC [MAJ BENEDICT]: I, Major Jeffrey Benedict, have been  
19 detailed to this military commission by the chief prosecutor.  
20 I'm qualified under R.M.C. 502 and have previously been sworn  
21 in accordance with R.M.C. 807. I have not acted in any manner  
22 which may tend to disqualify me from this proceeding.

23 MJ [COL ACOSTA]: Thank you, Counsel.

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1 TC [MR. MILLER]: Thank you, Your Honor.

2 MJ [COL ACOSTA]: Mr. Natale.

3 LDC [MR. NATALE]: Good morning, Your Honor.

4 MJ [COL ACOSTA]: Good morning.

5 LDC [MR. NATALE]: Anthony Natale on behalf of Mr. Abdul  
6 [sic] Rahim al Nashiri. I am accompanied here in the remote  
7 location with the following attorneys: There is Ms. Katherine  
8 Carmon; there is Lieutenant Commander Alaric; there is Annie  
9 Morgan; and I also believe that in attendance is Brigadier  
10 General Baker.

11 Ms. Carmon needs to be sworn in, and so that's  
12 something that I think we need to do.

13 Also locally is going to be Ms. Brandi Janes, who is  
14 our senior paralegal; our investigator, Marc Dolphin; and  
15 another paralegal, which is LN1 Bridgewater. And I think  
16 that's everyone for now, Judge.

17 As far as in the courtroom with you, it is Captain  
18 Mizer, it is the defendant, and our interpreter.

19 MJ [COL ACOSTA]: All right. Defense Counsel, could  
20 Ms. Carmon please come forward and announce her detailing  
21 qualifications, please.

22 DC [MS. CARMON]: Hi. Good morning, Your Honor. My name  
23 is Katie Carmon. I have been detailed to this commission by

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1 the chief defense counsel. I am qualified pursuant to  
2 Rule 502(d)(3). I have not taken an oath yet, so I will need  
3 to do that this morning. My detailing memorandum can be found  
4 at AE 339V. And I have not acted in any way that would tend  
5 to disqualify me from this proceeding.

6 MJ [COL ACOSTA]: Thank you, Ms. Carmon. Please remain  
7 standing. Raise your right hand.

8 **[Counsel was sworn.]**

9 MJ [COL ACOSTA]: Thank you. You may be seated.

10 Mr. Nashiri, good morning. I will now advise you of  
11 your right to be present and to waive said presence. You have  
12 the right to be present during all sessions of the commission.  
13 If you request to absent yourself from any session, such  
14 absence must be voluntary and of your own free will.

15 Your voluntary absence from any session of the  
16 commission is an unequivocal waiver of the right to be present  
17 during that session. Your absence from any session may  
18 negatively affect the presentation of the defense in your  
19 case. Your failure to meet with and cooperate with your  
20 defense counsel may also negatively affect the presentation of  
21 your case.

22 Under certain circumstances, your attendance at a  
23 session can be compelled, regardless of your personal desire

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1 not to be present. Regardless of your voluntary waiver to  
2 attend a particular session of the commission, you have the  
3 right, at any time, to decide to attend any subsequent  
4 session. If you decide not to attend the morning session but  
5 wish to attend the afternoon session, you must notify the  
6 guard force of your desires. Assuming there is enough time to  
7 arrange transportation, you will then be allowed to attend the  
8 afternoon session.

9           You will be informed of the time and date of each  
10 commission session prior to the session to afford you the  
11 opportunity to decide whether you wish to attend that session.

12           Mr. Nashiri, do you understand what I have just  
13 explained to you?

14           ACC [MR. AL NASHIRI]: **[Speaking in English]** Yes, I do.  
15 Yes. Yes.

16           MJ [COL ACOSTA]: Okay. I want to note that since we  
17 conducted our last hearing in January of 2020, Major Robinson  
18 requested, in March 2021, to withdraw from representing you.  
19 I approved his request to withdraw in Appellate Exhibit 339U  
20 on 15 April 2021.

21           Another thing I'd like to discuss with you,  
22 Mr. Nashiri, is the location of your defense counsel for this  
23 hearing. As can you can -- as you can see, you only have one

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1 of your defense counsel here present with you, and I'm sure  
2 you're well aware of that. But the rest of your attorneys,  
3 including Mr. Natale, are participating in the hearing from  
4 the Remote Hearing Room in the Washington, D.C. area. I  
5 understand that is primarily because we expect a number of  
6 witnesses to testify remotely from that location during this  
7 hearing. And your counsel will be there where those witnesses  
8 are, in person, to ask the witnesses questions.

9 Have you had the opportunity to discuss this  
10 arrangement with your defense counsel?

11 ACC [MR. AL NASHIRI]: **[Speaking in English]** Yes. Yes.

12 MJ [COL ACOSTA]: Do you understand what your defense  
13 counsel told you about this arrangement?

14 ACC [MR. AL NASHIRI]: **[Speaking in English]** Yes.

15 MJ [COL ACOSTA]: During the hearing, I will make sure  
16 that you have an opportunity to consult privately with  
17 Mr. Natale and your other attorneys that are -- that are  
18 participating remotely if you need to.

19 Do you understand that?

20 ACC [MR. AL NASHIRI]: **[Speaking in English]** Okay. This  
21 good.

22 MJ [COL ACOSTA]: Do you have any questions regarding the  
23 participation of Mr. Natale and the other detailed defense

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1 counsel from the Remote Hearing Room?

2 ACC [MR. AL NASHIRI]: [Speaking in English] No.

3 MJ [COL ACOSTA]: Do you have any objection to some of  
4 your counsel participating in this hearing remotely from the  
5 Remote Hearing Room?

6 ACC [MR. AL NASHIRI]: [Speaking in English] No.

7 MJ [COL ACOSTA]: All right. One other thing I need to  
8 put on the record is that this morning when I entered the ELC,  
9 I entered my chambers and it became apparent to me that the  
10 arranged meeting between the defense team and Mr. Nashiri was  
11 ongoing. Nothing but completely indistinguishable talking  
12 could be heard over a speaker, I presume. But in an abundance  
13 of caution, my staff and I exited the building and we did not  
14 reenter the building until we saw that Captain Mizer had  
15 exited the building, informing us by his absence from the  
16 courtroom that the meeting had concluded -- that the private  
17 meeting had concluded.

18 Captain Mizer, do you have any questions about that?

19 DDC [CAPT MIZER]: I do not, Judge.

20 MJ [COL ACOSTA]: Okay. Now I'd like to briefly go over  
21 some of the procedural history over the past 20 months since  
22 our last hearing concluded on 10 January 2020. At that time  
23 we expected to conduct four additional hearings during the

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1 calendar year 2020 as ordered in AE 403E, the scheduling order  
2 for 2020.

3           On 25 February 2020, in Appellate Exhibit 403M, the  
4 commission granted a defense motion for a continuance and  
5 cancelled the hearings scheduled for April 2020 and May 2020.  
6 Then on 21 April 2020, in Appellate Exhibit 4030, the  
7 commission cancelled the hearing scheduled to begin in  
8 June 2020 during the outbreak of the COVID-19 pandemic.  
9 Ultimately, due to the pandemic, the commission found it  
10 necessary to cancel the remainder of the hearings scheduled to  
11 take place in calendar year 2020.

12           On 29 October 2020, in Appellate Exhibit 423, the  
13 commission ordered -- scheduled another hearing to take place  
14 from the 15th of March 2021 to 2 April 2021. However, on  
15 15 January 2021, the commission ordered the March hearing  
16 cancelled due to the continued pandemic, the fact that  
17 vaccines were not yet widely available, and due in other part  
18 to pending discovery issues that are relevant to the issues  
19 that the commission intends to take up during this scheduled  
20 hearing.

21           I put this on the record to explain for the record why  
22 the commission has not been in session for such a lengthy  
23 period of time.

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1           There have been several R.M.C. 802 conferences  
2 conducted in the intervening period, which I will put on the  
3 record now. On 8 December 2020 I conducted an R.M.C. 802  
4 conference with counsel for both sides and we discussed the  
5 fact that the government had arranged to provide Mr. Natale  
6 with access to a secured information facility in Florida so  
7 that he could review classified materials.

8           I also inquired as to the defense counsel's ability to  
9 communicate with the accused. The defense indicated that  
10 their main form of communication were written letters and that  
11 they were experiencing difficulties with that form of  
12 communication, including the translation process.

13           We discussed logistics for the March 2021 hearing,  
14 which was subsequently cancelled. We discussed a litigation  
15 plan for that hearing as well and, as usual, we discussed the  
16 status of discovery, the status of various pending motions,  
17 including AE 327, 335, 319, 367, and 412. Additionally, we  
18 also discussed AEs 354, 359, and we discussed the initial --  
19 we had initial discussions of a 2021 hearing scheduled past  
20 March and hoped to have two more sessions in 2021.

21           On 2 September 2021 I conducted another R.M.C. 802  
22 conference where we discussed the logistics for the September  
23 hearing and we moved on to the litigation plan. Both sides

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1 anticipated only taking evidence regarding AEs 369, 399, and  
2 419 on the intrusion issue. Defense anticipated approximately  
3 25 witnesses and the government had just sent the defense a  
4 document explaining where certain witnesses would testify  
5 from, from the -- whether or not at Naval Station Guantanamo  
6 Bay or in the National Capital Region during the first or  
7 second week.

8           The defense sent a chronological list to the  
9 government for their witnesses. And the defense wanted to  
10 ensure where counsel -- that counsel that were doing the  
11 examination of those witnesses would be in the same physical  
12 location as the witnesses being examined.

13           The government requested from the defense a list of  
14 what needed to be declassified. The parties agreed to call  
15 non-contested witnesses first and the motion to compel later.  
16 The government provided notice that they might call rebuttal  
17 witnesses, numerous rebuttal witnesses, and the defense  
18 requested a list. The government did not -- was not prepared  
19 to do so at that time, but that was resolved later and I'm  
20 going to get to that in just a moment.

21           The defense indicated that they believed all sessions  
22 would probably, in all likelihood, be closed. And Mr. Natale  
23 stated that his preference was for the accused to be present

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1 during that closed session but knows that the rules don't  
2 permit that.

3 The government anticipated taking up the R.M.C. 505(h)  
4 hearing on -- today, and the defense discussed meeting with  
5 the -- with Mr. Nashiri at the -- at this location.

6 The defense also stated that there was an issue of the  
7 attorney-client meeting location in AE 398 is not resolved and  
8 that it will likely be taken up in the December session that  
9 we have scheduled now. And we discussed the other issues to  
10 take up in the December session regarding their request for a  
11 DNA expert. And these are AEs 437, 444, 398, and 359.

12 On 20 September I conducted another R.M.C. 802  
13 conference with counsel where we discussed new members of the  
14 trial and defense teams that needed to be sworn in. I  
15 addressed to the parties my expectations regarding the  
16 handling of documentary evidence during the hearing that is  
17 scheduled this week and next week.

18 We addressed logistics related to witness testimony  
19 during the motion hearing, to include the order in which their  
20 testimony will be taken and whether the commission could or  
21 would be able to take the testimony of a defense witness later  
22 today in open session.

23 The defense raised issues regarding the identity of

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1 certain witnesses and their ability to effectively  
2 cross-examine those witnesses. I also inquired with the  
3 parties as to whether there was any possibility of a  
4 stipulation of uncontested facts relevant to the -- to the  
5 issues that I'm going to hear over the next two weeks.  
6 Neither party indicated that they had sought to or agreed to a  
7 stipulated set of facts.

8           The defense raised the issue that Mr. Natale had not  
9 been able to meet with his client yesterday morning as planned  
10 because of coordination issues, and I agreed to give  
11 Mr. Natale an extra hour this morning before the hearing to  
12 begin with the accused, if necessary. And that was  
13 accomplished this morning, as I just referenced.

14           We discussed the protocols in the courtroom and the  
15 Remote Hearing Room for the wearing of face masks. Witnesses  
16 will -- all witnesses will testify without masks. And,  
17 Counsel, to refine what I said yesterday, what I just said  
18 before, is that while you're questioning from the podium you  
19 may take your mask off, or speaking from the podium away from  
20 others, you may take your mask off to speak.

21           Finally, we briefly discussed Captain Mizer's ability  
22 to communicate privately from the courtroom here at Guantanamo  
23 with the rest of the defense team located in the

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1 Washington, D.C. area. Mr. Natale requested assurance that  
2 such communications would not be monitored. Mr. Wells  
3 represented the government would ensure the privacy of those  
4 communications, or would confirm the privacy of those  
5 communications.

6 Mr. Wells, have you been able to do that?

7 MATC [MR. WELLS]: Yes, sir, I have.

8 MJ [COL ACOSTA]: Defense, are you so assured?

9 LDC [MR. NATALE]: Yes, Your Honor.

10 MJ [COL ACOSTA]: Do counsel have anything else they'd  
11 like to add to my summary of the 802, of all of our 802  
12 sessions?

13 TC [MR. MILLER]: Nothing from the government, Your Honor.

14 LDC [MR. NATALE]: Nothing for the defense, Your Honor.

15 MJ [COL ACOSTA]: All right. Counsel, before we move to  
16 the M.C.R.E. 505(h) hearing that we've scheduled for today, I  
17 want to revisit that issue of the -- that we discussed late  
18 yesterday which is, defense, you indicated that you may wish  
19 to call a Ms. Jennifer Lubke to testify in open session before  
20 the commission closes for the 505(h) hearing. There were some  
21 concerns on the part of the government of whether or not that  
22 was possible given the material to be discussed. Has this  
23 been resolved, defense?

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1 DDC [CAPT MIZER]: Judge, I don't believe so -- but again,  
2 would you like me to address the court from the podium?

3 MJ [COL ACOSTA]: If you would, please. Thank you. If  
4 may just be easier, Captain Mizer, to hear you.

5 DDC [CAPT MIZER]: Good morning, Judge.

6 MJ [COL ACOSTA]: Good morning.

7 DDC [CAPT MIZER]: I don't believe so. Commander Lubke is  
8 in -- either in the ELC North or the RHR and available to  
9 testify. We told her to be there approximately at 11:00. I  
10 don't know that she has access to classified information on  
11 this topic to which she could testify. And I believe with a  
12 little leeway, I could avoid even remotely eliciting anything  
13 that would be classified. It would be a brief, perhaps 30  
14 minutes of testimony for both sides.

15 And, Judge, I -- I know that you're well aware of the  
16 Grunden case and the famous language from that case, that you  
17 are to use a scalpel, not an axe, in closing the session. And  
18 I would submit that having one witness out of over 90 testify  
19 in open session is probably not a scalpel, but we think that  
20 it should be in open testimony, Judge.

21 MJ [COL ACOSTA]: All right. Government, have you had a  
22 chance to interview Ms. Lubke and determine whether or not the  
23 matters upon which she will testify, or evaluate whether or

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1 not the session would need to be closed to accommodate her  
2 testimony?

3 MATC [MR. WELLS]: Your Honor, John Wells ----

4 MJ [COL ACOSTA]: You can take your mask off, Mr. Wells.

5 MATC [MR. WELLS]: Thank you, sir. Your Honor, we have  
6 not interviewed her, but the defense did propose a stipulation  
7 of expected testimony. I think it is as generally described  
8 by Captain Mizer. However, the context of that conversation  
9 and the cross-examination certainly may touch on classified  
10 matters, and the location of that testimony and other details  
11 I would expect need to remain classified. So we would like to  
12 address this in the 505 setting and have you make findings of  
13 fact on whether or not her direct and cross-examination should  
14 be closed.

15 MJ [COL ACOSTA]: You mentioned that there's a stipulation  
16 of expected testimony proposed by the defense, government. Is  
17 that -- is that what you said?

18 MATC [MR. WELLS]: That's correct.

19 MJ [COL ACOSTA]: Is that a stipulation that you can agree  
20 to or not?

21 MATC [MR. WELLS]: Sir, there are some aspects of it, but  
22 some of the speculation portrayed as opinion, no, we cannot.  
23 And ----

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1 MJ [COL ACOSTA]: Well, you're not -- you're not -- what  
2 you're saying is you're not willing to stipulate that that's  
3 what she's going to testify to? Because the stipulation of  
4 expected testimony, would that not alleviate this issue of  
5 whether or not she would testify in open session or not and  
6 just have the -- is there anything classified in the  
7 stipulation of expected testimony that would be read into --  
8 that would be read into the record?

9 MATC [MR. WELLS]: Sir, we could -- I think it would be  
10 classified, the matters that the government would like to put  
11 into the stipulation. I think the presentation from the  
12 defense possibly could be interpreted by the original  
13 classification authorities also as classified.

14 I'm not aware that the defense has sought, through  
15 their DISO, to have that reviewed. They haven't certified  
16 that to me. It hasn't been presented to me in that way, Your  
17 Honor.

18 MJ [COL ACOSTA]: All right. I don't have any other  
19 questions for you.

20 Defense Counsel, before we proceed, Mr. Natale, were  
21 you able to meet successfully with -- with your client this  
22 morning?

23 LDC [MR. NATALE]: Yes, Your Honor. There was a -- and

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1 this is more so to let you know about what happened. At  
2 approximately 0920 there was a break in the connection. And  
3 so for some reason there was a break, but they were  
4 subsequently able to correct that and we were able to have our  
5 conversation.

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

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1 [REDACTED]

2 [REDACTED]

3 MJ [COL ACOSTA]: Let me ask a couple of questions of the  
4 defense before we get into that, Captain Mizer.

5 Captain Mizer, have you been requesting -- is there a  
6 process for you to request space and VTC capability back  
7 with -- in the D.C. area with the rest of the defense team?

8 DDC [CAPT MIZER]: There is, Judge.

9 MJ [COL ACOSTA]: Okay.

10 DDC [CAPT MIZER]: And we have been -- this is a new  
11 process, Judge, and we've been doing what we think is the  
12 appropriate thing to accomplish that. I'm not sure still  
13 where the breakdown was yesterday. There's three moving  
14 parts, as I understand it, and maybe the breakdown was here.

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

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1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 MJ [COL ACOSTA]: Okay. Government, I know that -- is  
8 there any issue with ensuring that there's a room with a -- an  
9 attorney-client meeting room where Captain Mizer can meet with  
10 the accused at the end of the day?

11 MATC [MR. WELLS]: Your Honor, we will work on that and  
12 coordinate better with the defense to make sure that they  
13 specifically request, through their special request, exactly  
14 what they want. I've done some research and it appears that  
15 the Joint Detention Group did respond appropriately and  
16 correctly to their inputs and their requests. So we will fine  
17 tune this new ----

18 MJ [COL ACOSTA]: What was ----

19 MATC [MR. WELLS]: ---- relationship and ----

20 MJ [COL ACOSTA]: What was their response? What was -- I  
21 don't know what their ----

22 MATC [MR. WELLS]: Yes, sir.

23 MJ [COL ACOSTA]: ---- request was or what the response

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1 was. Was it yes, we can accommodate you, or no, we're not  
2 going to accommodate you?

3 MATC [MR. WELLS]: Sir, the sequence of events was on  
4 September 11 the JTF received an attorney-client meeting  
5 request for the full two weeks, I believe from 0900 to 1230  
6 and from 1600 to 1630, specified the certain location that did  
7 not include the courtroom.

8 Subsequent to that on ----

9 MJ [COL ACOSTA]: But on the ELC?

10 MATC [MR. WELLS]: On the ELC.

11 MJ [COL ACOSTA]: Right.

12 MATC [MR. WELLS]: Yes, sir.

13 MJ [COL ACOSTA]: But not in the courtroom.

14 MATC [MR. WELLS]: But not in the courtroom so that they  
15 could use the Remote Hearing Room connectivity. Subsequent to  
16 that on September 15th, received communication from Captain  
17 Mizer asking the prosecution to ensure that the connectivity  
18 was set up so that they could conduct a meeting also with  
19 counsel up north.

20 I said yes, we will work with the Office of Special  
21 Security. We will also work with the Office of the Convening  
22 Authority and make that happen. However, it's incumbent upon  
23 the defense to submit the proper request for an

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1 attorney-client meeting to the Joint Detention Group.

2 I've made preliminary inquiries and I've determined  
3 that the defense did not change their September 11 request,  
4 meaning they did not submit an additional request specifying  
5 to come into the RHR. I know the commission had the  
6 expectation that they should meet in this room, but the  
7 defense did not share it with the prosecution. I also asked  
8 if there were any scheduling troubles, to share it with us.

9 The Joint Detention Group is not going to change the  
10 defense input unless -- have a written order from the  
11 commission directing so.

12 They've done that in the past ----

13 MJ [COL ACOSTA]: Sorry.

14 MATC [MR. WELLS]: ---- and it's ensued in litigation.

15 MJ [COL ACOSTA]: Could you repeat what you just said?  
16 You want me to order the defense to change their request? Is  
17 that what you're asking?

18 MATC [MR. WELLS]: Sir, the Joint Detention Group will not  
19 change a defense request just based on the prosecution input.  
20 The commission does have the authority, though, to request or  
21 direct certain accommodation with the facilities that you  
22 control, like the courtroom, and then that input can be  
23 operationalized by the Joint Detention Group with instructions

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1 to the guard force.

2 But when they receive a request from the defense  
3 specifying an exact location that does not include the  
4 courtroom so they can have the Remote Hearing Room -- con --  
5 counsel, then the Joint Detention Group is not going to change  
6 that request. That leads to additional litigation and  
7 additional problems.

8 So we will work with the defense to iron out all the  
9 wrinkles. And as Captain Mizer said, this is a new process.  
10 And I hear Mr. Natale. So we will use our good offices to  
11 assist in this.

12 MJ [COL ACOSTA]: Okay.

13 MATC [MR. WELLS]: So I think a thing for the commission  
14 that needs to be, when do you want to start each day? Meeting  
15 with their counsel from 0900 to 1230 is right in the time when  
16 we're supposed to be having commission. In the past I believe  
17 he's arrived either at 0700 or 0800 to get a full hour in so  
18 that you could start at 0900 or at 0800. So I think that is a  
19 consideration.

20 I also understand that the defense would like to meet  
21 with the accused after proceedings at the end of the day. And  
22 it's up to the defense, and I supposed the accused, if he  
23 wants to remain here in the ELC or waive that meeting and

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1 return back to the camp.

2 MJ [COL ACOSTA]: All right.

3 MATC [MR. WELLS]: So that's all I have, Your Honor. Any  
4 questions?

5 MJ [COL ACOSTA]: No.

6 MATC [MR. WELLS]: Thank you, sir.

7 LDC [MR. NATALE]: Your Honor?

8 MJ [COL ACOSTA]: Yes, Mr. Natale.

9 LDC [MR. NATALE]: I think -- let me see if I can try to  
10 simplify this. Originally, we only had certain information as  
11 to where we would be and who would be where. Now we know that  
12 who's going to be down on island and who is here.

13 What we are requesting is that every morning, whatever  
14 time is needed in order to ensure that we can have an hour  
15 with the client prior to the commencement of any court  
16 proceedings, and that we have a hour at the end of the day to  
17 do that, and that we have it in the specific -- that the ----

18 MJ [COL ACOSTA]: You want it in a particular location, is  
19 that what you're saying?

20 LDC [MR. NATALE]: In order for us to have the contact  
21 that we need, it has to be ----

22 MJ [COL ACOSTA]: In a particular location?

23 LDC [MR. NATALE]: ---- in a particular location.

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1 MJ [COL ACOSTA]: Okay. Have you put that request in? Is  
2 there -- beside -- it appears that the government ----

3 I'm not ready for you, Mr. Wells.

4 The government seems to indicate that you're going to  
5 need to request the specific times and the locations that you  
6 want to meet with your client, and that you had previously  
7 requested meetings that were occurring during our session that  
8 we scheduled here. I would ask that you -- if -- to the  
9 extent that it is required, that you submit a new request or  
10 an updated request or a revised request to meet, when you want  
11 to meet prior to the day -- the start of the day when we're  
12 going to begin here, which is at 0900 in the morning every  
13 morning that we're here. And if you want to meet after that,  
14 then you pick a time at the end of the close of business,  
15 sometime around 1700 would be appropriate, and that you  
16 specify the location that you wish to have this meeting.

17 And if you need to also have access to the building  
18 where you are, or to some other location for the -- for the  
19 remote team, that you specify that you -- where you want to --  
20 that meeting to occur, or -- to where that -- what to be open  
21 up there for you to facilitate it. Because it does us no  
22 good, and it will do you no good to have Mr. Nashiri and  
23 Captain Mizer sitting in a room connected to someplace that

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1 you're not at.

2 So can you get that request in? And can the  
3 government accept it and process it in a timely manner to  
4 facilitate the meetings that are required?

5 LDC [MR. NATALE]: Yes, Your Honor.

6 MJ [COL ACOSTA]: Defense?

7 LDC [MR. NATALE]: Yes, Your Honor, we will do that as  
8 quickly as we can get someone to go upstairs to our office,  
9 type it up and send it out.

10 MJ [COL ACOSTA]: Okay. And, government, I am directing  
11 you to do exactly what you said, which is to -- is to  
12 coordinate for this and to make it happen. And if there's any  
13 time period that this is short of that this is -- because this  
14 is a new request, that you accommodate that this is a newer  
15 request and make it happen. Thank you.

16 Mr. Natale, you remain standing. Is there something  
17 else?

18 LDC [MR. NATALE]: I didn't -- there -- there is, but I  
19 think it's probably something that would best be taken up when  
20 we go into the closed session. There are some preliminary  
21 matters that I think need to be brought to the court's  
22 attention before we do the 505(h).

23 MJ [COL ACOSTA]: All right. Well, with that, I think

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1 what we're going to do is we're going to recess now.

2 Captain Mizer?

3 DDC [CAPT MIZER]: Judge, just very quickly. I mean, can  
4 we make sure that -- we will submit the paperwork. We've  
5 submitted the paperwork for this specific location before.  
6 But can we just make sure, given the time frame, that he will  
7 be held in that specific location after court, to where I can  
8 meet with him, so that that issue is resolved today at least?  
9 And then we'll try to paper the record going forward.

10 MJ [COL ACOSTA]: Yes. Government, the defense is  
11 requesting now that he be kept in the -- the location where  
12 they have previously held attorney-client meetings that has a  
13 table and chairs, and I believe you know the location they're  
14 talking about. Can you arrange for him to be kept there today  
15 during this closed session, please?

16 MATC [MR. WELLS]: Is that the request? Okay. Yes, sir.

17 MJ [COL ACOSTA]: Okay. Thank you.

18 MATC [MR. WELLS]: We will do that, yes.

19 MJ [COL ACOSTA]: Thank you.

20 DDC [CAPT MIZER]: Thank you, Judge.

21 MJ [COL ACOSTA]: Okay. All right. The defense in AE  
22 440F, the defense provided notice in accordance with  
23 M.C.R.E. 505(g)(1)(A) of expected disclosure of classified

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1 information in conjunction with the litigation of AEs 369,  
2 399, and 419. In response, in Appellate Exhibit 440H, the  
3 government requested a hearing pursuant to  
4 M.C.R.E. 505(h)(1)(A) to safeguard national security and to  
5 permit the commission to evaluate the use, relevance, and  
6 admissibility of classified information noticed by the defense  
7 in AE 440F.

8 The government represented in their motion the defense  
9 does not object to conducting the M.C.R.E. 505(h) hearing.  
10 The commission originally scheduled the M.C.R.E. 505(h)  
11 hearing to occur on 2 September 2021 in the National Capital  
12 Region. The defense moved for a continuance in AE 453, and I  
13 granted that request with respect to the M.C.R.E. 505(h)  
14 hearing in AE 453B on 30 August 2021.

15 In our R.M.C. 802 conference both parties indicated  
16 that the information addressed -- to be addressed in the  
17 M.C.R.E. 505 conference is classified that needs to be taken  
18 up in a -- in a -- in an in camera M.C.R.E. 505 hearing.

19 Do both parties concur with that summary? Government?

20 TC [MR. MILLER]: Yes, the government does, Your Honor.

21 MJ [COL ACOSTA]: Defense?

22 DDC [CAPT MIZER]: Yes, Your Honor.

23 MJ [COL ACOSTA]: All right. So at this time, because we

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1 have to take up an in camera 505(h) hearing, this session will  
2 be closed to the -- will be held in camera, closed to the  
3 public and to the accused, and the accused will not be  
4 present. The commission is in recess.

5 [The R.M.C. 803 session recessed at 1052, 21 September 2021.]

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